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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1801

VINCENZO SPATA and GIUSEPPA SPATA,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No.

VINCENZO SPATA and GIUSEPPA SPATA,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on May 11, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was en-

tered on May 11, 1971, and appears in the Appendix hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner VINCENZO SPATA should be put back in the "special class" of aliens whose applications for adjustment of immigration status are not being adjudicated, but who are being permitted to remain in the United States until an immigrant visa becomes available or remedial legislation passes.

STATUTORY PROVISION INVOLVED

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 245, 8 U.S.C. 1255--

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes application for such adjustment, (2) the alien is eligible to receive an immigrant visa

and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

STATEMENT OF THE CASE

Petitioner VINCENZO SPATA entered the United States as a nonimmigrant visitor on September 23, 1964. On August 17, 1967, he applied for adjustment of his immigration status to permanent resident under Section 245 of the Immigration and Nationality Act. This application was based on an approved visa petition filed in his behalf on October 11, 1966, which authorized him Italian 6th preference quota status. (Decision of Special Inquiry Officer, 1-2).

Respondent's New York District Director denied the application, as a matter of discretion, because of petitioner's crimes. From such a denial no appeal is permitted. However, in deportation proceedings thereafter commenced, petitioner renewed his application.

At the conclusion of the deportation hearing,

the Special Inquiry Officer found petitioner statutorily eligible for Voluntary Departure in lieu of deportation -- thereby determining that petitioner was a person of good moral character for at least the past five years -- but denied the application for adjustment of status because an immigrant visa was unavailable to petitioner. (Decision of Special Inquiry Officer, 2-3).

On August 17, 1967, when petitioner filed his application for adjustment of status, the quota was open and an immigrant visa was available to him. Thereafter, a change in the immigration laws caused the Italian 6th preference quota to become oversubscribed and immigrant visas to become unavailable.

Thereupon, respondent's District Director established a "special class" of aliens whose applications for adjustment of status have been deferred and are not being adjudicated.

Allegedly because of crimes, petitioner was taken out of this "special class" of deferred applications and, since an immigrant visa was unavailable

to him at the time of his deportation hearing, adjudication of his application resulted in a mandatory denial solely on that ground. (Decision of Special Inquiry Officer, 2).

Petitioner GIUSEPPA SPATA is the wife of VINCENZO SPATA and is joined in this action to permit her to remain in the United States pending review of the husband's case. If the latter is successful in adjusting his immigration status, the wife could thereupon adjust her status. ANGELO SPATA, son of petitioners herein, was also a petitioner in the Court of Appeals but has been dropped from the action because his status is being adjusted in a different manner.

REASONS FOR GRANTING THE WRIT

Applications for adjustment of status under Section 245 of the Immigration and Nationality Act are usually based upon an approved visa petition under Section 203(a) of the Immigration and Nationality Act, 8 U.S.C. 1153(a). Petitioner herein was the beneficiary of such a visa petition -- one

granting him Italian 6th preference quota status under Section 203(a)(6) of the Act, requiring a Department of Labor Alien Employment Certification to evidence shortage of such workers in the United States.

As a matter of policy, after approval of such visa petitions, respondent invites aliens to apply for adjustment of status, if eligible.

Section 245 of the Immigration Act requires that an immigrant visa be immediately available to the alien at the time of the approval of the application. At the time he filed his application for adjustment of status on August 17, 1967, an immigrant visa was immediately available to petitioner pursuant to Title 8, C.F.R. 245.1(g).

However, on July 1, 1968, the permanent provisions of the law respecting numerical limitations of the Immigration Act of October 3, 1965, Pub. L. 89-236, Sec. 3, 79 Stat. 911, 912-915, took effect. This change in law caused Italian 6th preference immigrant visas to become unavailable. And, if an

application for adjustment of status is adjudicated when an immigrant visa is unavailable, the application must be mandatorily denied.

Since applications of many aliens were filed when immigrant visas were available, respondent was reluctant to deny the applications because of the sudden unavailability of immigrant visas. Respondent, therefore, adopted the practice of deferred adjudication of these applications. That is, rather than mandatorily deny the applications, the aliens are permitted to remain in the United States pending future availability of immigrant visas, or remedial legislation, at which time the applications will be favorably adjudicated.

When respondent adopted the practice specified and applied it to all aliens similarly situated, respondent established a "special class" of aliens with respect to which special discretion is exercised. See U. S. ex rel. Knauff v. McGrath, 181 F. 2d 839 (2d Cir., 1950).

While respondent does not concede the extent or

inclusiveness of the "special class," it was admitted in the Court of Appeals that respondent's District Director did adopt an "informal policy of allowing certain aliens to remain indefinitely" in the United States. "This policy extended to aliens of any nationality, whose quota had closed after an application had been accepted and whose application would otherwise have merited the favorable exercise of discretion. Accordingly the District Director would grant deferred voluntary departure only to those aliens whose applications would have been granted, except for the closing of their quota." (Respondent's brief to Court of Appeals, 11).

Be it "informal," a "special class" with special privileges was created. Then, when the District Director denied petitioner's application because of crimes, petitioner was summarily taken out of that "special class." Since there is no appeal from the District Director's decision, 8 C.F.R. 245.2(a)(4), petitioner could not directly challenge the determination. The only type of "review" available was

to renew the application for adjustment of status in a deportation hearing before a Special Inquiry Officer. This petitioner did, but, when the case reached the deportation proceedings stage, the quota "closed," immigrant visas became unavailable, and the Special Inquiry Officer mandatorily denied the application, solely on that ground.

By granting petitioner Voluntary Departure in lieu of deportation under Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. 1254(e), the Special Inquiry Officer found petitioner to be a person of good moral character. From this determination it is not unreasonable to infer that petitioner's crimes were not sufficient to militate against him and that petitioner's application for adjustment of status might have been granted if an immigrant visa was available at the time of the deportation proceedings.

If petitioner's application for adjustment of status could be granted with an available immigrant visa, it follows that he should not have been taken

out of the "special class" of aliens who are having their applications deferred. Respondent's actions have deprived petitioner of the right to have his application for adjustment of status determined after an immigrant visa becomes available, the privilege still allowed other aliens who remain in the "special class." Taking petitioner out of the "special class" was tantamount to an abuse of discretion and deprived petitioner of the equal protection of the law.

Petitioner should be put back in the "special class" and permitted to remain in the United States until an immigrant visa becomes available to him, or remedial legislation passes, at which time adjudication of his application for adjustment of immigration status could result in a favorable determination.

It is believed that a humanitarian approach should be extended to an entire defined class of aliens, rather than to selected individuals. The Government will not be hurt if petitioner is per-

mitted to remain in the "special class." Deportation can be effected later if he is found ineligible for adjustment of status. However, if petitioner is required to depart the United States at this time and it later appears that his application for adjustment of status could have been granted, he would be deprived of the right of lawful permanent residence, and eventual United States citizenship, a truly serious loss to him.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the Second Circuit.

Respectfully submitted,

FERRO AND CUCCIA
Attorneys for Petitioners.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 440—September Term, 1970.

(Argued February 10, 1971 Decided May 11, 1971.)

Docket No. 33715

VINCENZO SPATA, GIUSEPPA SPATA and ANGELO SPATA,

Petitioners,

—against—

IMMIIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

WATERMAN and FRIENDLY, *Circuit Judges,* and
MCLEAN, *District Judge.**

Petition by Vincenzo Spata, pursuant to 8 U.S.C. §1105a, to review an order of the Board of Immigration Appeals dated April 9, 1969, dismissing petitioner's appeal from a decision of a Special Inquiry Officer dated November 12, 1968, and directing that if petitioner fails to depart voluntarily from the United States, he shall be deported to Italy. Petition denied.

* Of the District Court for the Southern District of New York, sitting by designation.

FERRO AND CUCCIA, New York, N. Y. *for Petitioners.*

STANLEY H. WALLENSTEIN, Special Assistant United States Attorney for the Southern District of New York (Whitney North Seymour, Jr., United States Attorney, and Joseph P. Marro, Special Assistant United States Attorney for the Southern District of New York, on the brief), *for Respondent.*

PER CURIAM:

Vincenzo Spata, a citizen of Italy, petitions to review an order of the Board of Immigration Appeals dated April 9, 1969, which granted him the privilege of voluntarily departing from the United States within a specified period and went on to provide that if he failed to do so he should be deported to his native Italy. Although petitioner's wife, Giuseppa Spata, and his son Angelo, are also named as petitioners, they were not parties to the deportation proceeding instituted by the Immigration and Naturalization Service against Vincenzo and make no claim on their own account. They have joined as petitioners only to take advantage of the provisions of 8 U.S.C. §1105a(a)(3) which grant them an automatic stay of deportation pending determination of the petition. We have concluded that the decision of the Board in Vincenzo's case, which is the only decision before us, was correct, and accordingly, we deny the petition to review.

The somewhat complicated procedural steps which have taken place over the years prior to the issuance of the Board's final order can best be understood by setting out a brief chronological summary of them. Vincenzo Spata,

a native and citizen of Italy, entered the United States on September 23, 1964, as a visitor for pleasure. He was authorized to remain until July 15, 1965. He remained in this country illegally beyond that date, with the result that he was taken into custody by the Immigration and Naturalization Service on October 10, 1966. On the next day, October 11, 1966, the petitioner's employer filed on his behalf a visa petition seeking to accord him preference quota status pursuant to 8 U.S.C. §1153(a)(6). This petition was approved by the District Director on May 24, 1967, valid until October 10, 1967.

Petitioner was granted a sixth preference. Such a preference is applicable to persons capable of performing labor for which a shortage of employable persons exists in the United States. Visas are to be made available to sixth preference holders only to the extent that the 20,000 numerical limitation on visas authorized for nationals of any single foreign state, 8 U.S.C. §1152(a), has not been exhausted by the needs of the five prior preferred classes.

On August 17, 1967, petitioner made application to the District Director, based upon his approved visa petition, for adjustment of his status to that of an alien lawfully admitted to permanent residence. This application was made pursuant to 8 U.S.C. §1255 and was addressed to the Attorney General's discretion. On May 27, 1968, the District Director denied the application because of petitioner's rather extensive criminal record in Italy. The District Director granted petitioner the privilege of voluntary departure from the United States up to June 6, 1968.

Petitioner failed to depart. Consequently, in September 1968, the District Director instituted deportation proceedings against him by order to show cause returnable before a Special Inquiry Officer. The Special Inquiry Officer

held a hearing on November 12, 1968. Petitioner was represented by counsel who conceded that petitioner had remained in this country without authority and that he was deportable. Petitioner sought to avoid deportation, however, by renewing his application which he had previously made unsuccessfully to the District Director for adjustment of his status to that of a lawfully admitted permanent resident. Such a renewal of his application was permissible under the regulations. 8 C.F.R. §245.2(a)(4).

8 U.S.C. §1255 requires that before an application for adjustment of status may be granted, not only must the alien be eligible to receive an immigrant visa, but a visa must be "immediately available to him at the time his application is approved." The Special Inquiry Officer ascertained by consulting the appropriate State Department bulletin that no immigrant visa was available to petitioner. This was because the five prior preferences had exhausted the visas allocable to Italian nationals, leaving none for the holders of a sixth preference. The Special Inquiry Officer therefore denied the application and directed that if petitioner did not depart voluntarily, he should be deported. On April 9, 1969, the Board of Immigration Appeals dismissed petitioner's appeal from the order of the Special Inquiry Officer, granted petitioner a further period for voluntary departure, and directed that in the event of his failure to avail himself of this privilege, he should be deported. Because the present petition for review has stayed the Board's order, petitioner is still in this country.

The correctness of the Board's order is the only question before us. We perceive no way in which the Board could have reached a different result, in view of the statutory requirement of an available visa, which concededly was not fulfilled. Petitioner argues that he should have

been put in a "special class" of aliens who he says are permitted to remain in this country until visas do become available. He does not direct us to any statutory or other authority for the creation of such a class. Although respondent appears to concede that the District Director has followed an "informal policy" to this effect, that would seem to be the business of the District Director. The District Director's 1968 order denying petitioner's application for adjustment of status is not now before us. Even if we were to assume that the Special Inquiry Officer had discretionary power to grant such a deferment, petitioner produced no evidence before the Special Inquiry Officer to overcome the adverse effect of petitioner's criminal record and to induce an exercise of discretion in his favor.

The petition is denied.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of May, one thousand nine hundred and seventy-one.

Present: HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judge,
HON. EDWARD C. McLEAN,
District Judge.

Vincenzo Spata, Giuseppa Spata, and Angelo Spata,

Petitioners,

v.

Immigration and Naturalization Service,

Respondent.

A petition for review of an order of the Board of Immigration Appeals.

This cause came on to be heard on the adminis-

trative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the petition be and it hereby is denied with costs to be taxed against the petitioner.

A. DANIEL FUSARO
Clerk